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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/757,116

01/14/2004

Karoleen B. Alexander

42635-0200

2947

21611 7590 10/14/2008  
SNELL & WILMER LLP (OC)  
600 ANTON BOULEVARD  
SUITE 1400  
COSTA MESA, CA 92626

EXAMINER

PARSLEY, DAVID J

ART UNIT

PAPER NUMBER

3643

MAIL DATE

DELIVERY MODE

10/14/2008

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 10/757,116	<b>Applicant(s)</b> ALEXANDER, KAROLEEN B.	
	<b>Examiner</b> DAVID J. PARSLEY	<b>Art Unit</b> 3643	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 18 July 2008.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1,3-5,7 and 10-21 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1,3-5,7 and 10-21 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 14 January 2004 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892)            | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)   | Paper No(s)/Mail Date. _____                                      |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date <u>7-18-08</u> .   | 6) <input type="checkbox"/> Other: _____                          |

Art Unit: 3643

## **Detailed Action**

### ***Amendment***

1. This office action is in response to applicant's amendment dated 7-18-08 and this action is final.

### ***Claim Rejections - 35 USC § 102***

2. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1 and 3 are rejected under 35 U.S.C. 102(b) as being anticipated by EP Patent No.

0135595.

Referring to claims 1 and 3, the European patent discloses a structure for placement on the ground comprising, a porous base layer of a combination of butadiene rubber and peelings or buffings and a first binder – see the English abstract and a wear layer of ethylene propylene diene monomer (EPDM) and a second binder on top of the base layer - see the English abstract which describes a first layer being hardened and then adding another layer of EPDM and a binder. The European patent further discloses the rubber of the base layer is a butadiene rubber being industrial rubber – see the English abstract. The European patent further discloses the

Art Unit: 3643

butadiene rubber is in granular form – see the English abstract. The European patent further discloses the rubber is in the form of peelings and/or buffings - see the English abstract. As seen in the English translation the device of the European patent is described as web material which implies a woven and not completely solid structure which will allow for the device to be porous. The European patent does not specifically disclose the combination of butadiene rubber granules and peelings or buffings is varied in amount relative to one another to increase or decrease the porosity of the base layer. However, these are product by process limitations in an apparatus claim and therefore these limitations are considered but they offer no further structural limitations to the apparatus claims and it is deemed that the device of the European patent can be made using these product by process limitations so as to allow for the device to have the desired material properties.

### ***Claim Rejections - 35 USC § 103***

3. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 4-5 are rejected under 35 U.S.C. 103(a) as being unpatentable over the European patent as applied to claim 2 above, and further in view of U.S. Patent No. 6,602,586 to Kakimoto et al or U.S. Patent Application Publication No. 2003/0091831 to Mickey.

Art Unit: 3643

Referring to claim 4, the European does not disclose the binder is isocyanate polyurethane. Kakimoto et al. and Mickey each disclose a layer of material comprising EPDM and a polyurethane isocyanate binder – see column 4 lines 15-65 of Kakimoto et al. and paragraphs [0016] thru [0018] of Mickey. Therefore it would have been obvious to one of ordinary skill in the art to take the device of the European patent and add the binder being isocyanate polyurethane of Kakimoto et al. or Mickey, so as to allow for the device to be strengthened and thus more durable.

Referring to claim 5, the European as modified by and Kakimoto et al. and the European patent as modified by Mickey does not disclose the ratio of binder to rubber is 16% by weight. However, this limitation is found through experimentation and it would have been obvious to one of ordinary skill in the art to take the device of the European as modified by Kakimoto et al. and the European patent as modified by Mickey and add the ratio of binder to rubber being 16% by weight, so as to allow for the device to be strengthened and thus more durable.

Claim 7 is rejected under 35 U.S.C. 103(a) as being unpatentable over the European patent as applied to claim 6 above, and further in view of U.S. Patent No. 5,396,731 to Byrne.

Referring to claim 7, the European patent does not disclose the rubber granules are in the range of 1.5 to 6 mm. Byrne does disclose the rubber granules are in the range of 1.5mm to 6mm – see for example column 4 lines 17-27. Therefore it would have been obvious to one of ordinary skill in the art to take the device of the European patent and add the rubber granules being between 1.5 and 6mm of Byrne, so as to allow for the device to be made compact.

Claims 10-12 are rejected under 35 U.S.C. 103(a) as being unpatentable over The European patent as applied to claim 9 above.

Art Unit: 3643

Referring to claims 10-11, the European patent does not disclose the mixture of granules to peelings or buffings is either 70% granules and 30% peelings or buffings or 50% granules and 50% peelings or buffings. However, these are limitations found through experimentation and it would have been obvious to one of ordinary skill in the art to take the device of the European patent and add the mixture of either 50 or 70% buffings and either 30 or 50% peelings or buffings, so as to allow for the device to be of a natural appearance.

Referring to claim 12, the European patent further discloses the rubber of the base layer is a butadiene rubber being industrial rubber – see the English abstract.

Claims 13-14 are rejected under 35 U.S.C. 103(a) as being unpatentable over the European patent as applied to claim 2 above.

Referring to claims 13-14, the European does not disclose the base layer is 1 ½ to 3 ½ inches or 2 inches thick. However, these limitations are found through experimentation and it would have been obvious to one of ordinary skill in the art to take the device of the European patent and add the base layer being 1 ½ to 3 ½ inches or 2 inches thick, so as to allow for the device to be made of sufficient size to make the device durable for outdoor use.

Claims 15-18 are rejected under 35 U.S.C. 103(a) as being unpatentable over the European patent as applied to claim 1 above, and further in view of Kakimoto et al. or Mickey.

Referring to claim 15, the European does not disclose the second binder is isocyanate polyurethane. Kakimoto et al. and Mickey each disclose a layer of material comprising EPDM and a polyurethane isocyanate binder – see column 4 lines 15-65 of Kakimoto et al. and paragraphs [0016] thru [0018] of Mickey. Therefore it would have been obvious to one of ordinary skill in the art to take the device of the European patent and add the binder being

Art Unit: 3643

isocyanate polyurethane of Kakimoto et al. or Mickey, so as to allow for the device to be strengthened and thus more durable.

Referring to claim 16, the European patent as modified by Kakimoto et al. and the European patent as modified by Mickey both do not disclose the ratio of binder to rubber is 20% by weight. However, this limitation is found through experimentation and it would have been obvious to one of ordinary skill in the art to take the device of the European patent as modified by Kakimoto et al. and the European patent as modified by Mickey and add the ratio of binder to rubber being 20% by weight, so as to allow for the device to be strengthened and thus more durable.

Referring to claim 17, the European patent as modified by Kakimoto et al. and the European patent as modified by Mickey further discloses the EPDM is granular – see the English abstract of the European patent.

Claim 18 is rejected under 35 U.S.C. 103(a) as being unpatentable over the European patent as modified by Kakimoto et al. and the European patent as modified by Mickey as applied to claim 17 above, and further in view of U.S. Patent No. 5,396,731 to Byrne.

Referring to claim 18, the European patent as modified by Kakimoto et al. and the European patent as modified by Mickey does not disclose the rubber granules are in the range of 1.5 to 6 mm. Byrne does disclose the rubber granules are in the range of 1.5mm to 6mm – see for example column 4 lines 17-27. Therefore it would have been obvious to one of ordinary skill in the art to take the device of the European patent as modified by Kakimoto et al. and the European patent as modified by Mickey and add the rubber granules being between 1.5 and 6mm of Byrne, so as to allow for the device to be made compact.

Art Unit: 3643

Claim 19 is rejected under 35 U.S.C. 103(a) as being unpatentable over the European patent as applied to claim 1 above, and further in view of U.S. Patent No. 4,205,102 to Schuurink et al.

Referring to claim 19, the European patent does not disclose the binder contains aliphatic diisocyanate. Schuurink et al. does disclose the binder contains aliphatic diisocyanate – see for example claim 3. Therefore, it would have been obvious to one of ordinary skill in the art to take the device of the European patent and add the binder containing aliphatic diisocyanate of Schuurink et al., so as to allow for the device to be strengthened and thus more durable.

Claim 20 is rejected under 35 U.S.C. 103(a) as being unpatentable over the European patent as modified by Schuurink et al. as applied to claim 19 above, and further in view of U.S. Patent No. 5,396,731 to Byrne.

Referring to claim 20, the European patent as modified by Schuurink et al. does not disclose the rubber granules are in the range of 1.5 to 6 mm. Byrne does disclose the rubber granules are in the range of 1.5mm to 6mm – see for example column 4 lines 17-27. Therefore it would have been obvious to one of ordinary skill in the art to take the device of the European patent as modified by Schuurink et al. and add the rubber granules being between 1.5 and 6mm of Byrne, so as to allow for the device to be made compact.

Claim 21 is rejected under 35 U.S.C. 103(a) as being unpatentable over the European patent as applied to claim 1 above.

Referring to claim 21, the European patent does not disclose the base layer 2 to 3 inches thick and the wear layer is 3/8 to 1/2 inch thick. However, these limitations are found through experimentation and it would have been obvious to one of ordinary skill in the art to take the



Art Unit: 3643

device of the European patent and add the base layer being 2-3 inches thick and the wear layer being 3/8-1/2 inch thick, so as to allow for the device to be of sufficient size to be durable for outdoor use while not being too bulky for transport.

Claims 1-3, 6-14 are rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. Patent No. 6,818,278 to Blythe in view of U.S. Patent No. 5,396,731 to Byrne.

Referring to claims 1, 3 and 12, Blythe discloses a structure for use on the ground comprising, a base layer of rubber – see column 1 lines 1-20, and a wear layer of EPDM and a binder on top of the base layer – see column 1 lines 1-20 and Examples A and B in column 4. Blythe does not disclose the base layer has a binder. Byrne does disclose the base layer – at 16 comprises rubber and a binder – see column 4 lines 7-64. Therefore it would have been obvious to one of ordinary skill in the art to take the device of Blythe and add the base layer with binder of Byrne, so as to allow for the components of the base layer to be securely held together. Blythe as modified by Byrne further discloses the rubber of the base layer is a butadiene rubber from tires – see column 4 lines 17-27 of Byrne. Therefore it would have been obvious to one of ordinary skill in the art to take the device of Blythe and add the base layer with rubber and binder of Byrne, so as to allow for the components of the base layer to be securely held together and thus more durable. Blythe as modified by Byrne further discloses the butadiene rubber is in granular form – see column 1 lines 1-20 of Blythe and column 4 lines 17-27 of Byrne. Blythe as modified by Byrne further discloses the butadiene rubber is in the form of peelings and/or buffings - see column 4 lines 7-64 of Byrne. Therefore it would have been obvious to one of ordinary skill in the art to take the device of Blythe as modified by Byrne and add the peelings and buffings of Byrne, so as to allow for the device to be easier to manufacture. Blythe as

Art Unit: 3643

modified by Byrne further discloses a porous base layer - see the abstract of Byrne and the combination of rubber granules and peelings or buffings is varied in amount relative to one another to increase or decrease the porosity of the base layer - see columns 4-5 of Byrne where the amount of rubber in the device can be varied to differing percentages of weight of the device. Therefore it would have been obvious to one of ordinary skill in the art to take the device of Blythe as modified by Byrne and add the porous base layer of Byrne, so as to allow for proper drainage through the device during use.

Referring to claim 7, Blythe as modified by Byrne further discloses the rubber granules are in the range of 1.5mm to 6mm – see for example column 4 lines 17-27 of Byrne. Therefore it would have been obvious to one of ordinary skill in the art to take the device of Blythe as modified by Byrne and add the rubber granules being between 1.5 and 6mm of Byrne, so as to allow for the device to be made compact.

Referring to claims 10-11, Blythe as modified by Byrne does not disclose the mixture of granules to peelings or buffings is either 70% granules and 30% peelings or buffings or 50% granules and 50% peelings or buffings. However, these are limitations found through experimentation and it would have been obvious to one of ordinary skill in the art to take the device of Blythe as modified by Byrne and add the mixture of either 50 or 70% buffings and either 30 or 50% peelings or buffings, so as to allow for the device to be of a natural appearance.

Referring to claims 13-14, Blythe as modified by Byrne not disclose the base layer is 1 ½ to 3 ½ inches or 2 inches thick. However, these limitations are found through experimentation and it would have been obvious to one of ordinary skill in the art to take the device of Blythe as

Art Unit: 3643

modified by Byrne and add the base layer being 1 ½ to 3 ½ inches or 2 inches thick, so as to allow for the device to be made of sufficient size to make the device durable for outdoor use.

Claims 4-5 are rejected under 35 U.S.C. 103(a) as being unpatentable over Blythe as modified by Byrne as applied to claim 2 above, and further in view of U.S. Patent No. 6,602,586 to Kakimoto et al or U.S. Patent Application Publication No. 2003/0091831 to Mickey.

Referring to claim 4, Blythe as modified by Byrne does not disclose the binder is isocyanate polyurethane. Kakimoto et al. and Mickey each disclose a layer of material comprising EPDM and a polyurethane isocyanate binder – see column 4 lines 15-65 of Kakimoto et al. and paragraphs [0016] thru [0018] of Mickey. Therefore it would have been obvious to one of ordinary skill in the art to take the device of Blythe as modified by Byrne and add the binder being isocyanate polyurethane of Kakimoto et al. or Mickey, so as to allow for the device to be strengthened and thus more durable.

Referring to claim 5, Blythe as modified by Byrne and Kakimoto et al. and Blythe as modified by Byrne and Mickey does not disclose the ratio of binder to rubber is 16% by weight. However, this limitation is found through experimentation and it would have been obvious to one of ordinary skill in the art to take the device of Blythe as modified by Byrne and Kakimoto et al. and Blythe as modified by Byrne and Mickey and add the ratio of binder to rubber being 16% by weight, so as to allow for the device to be strengthened and thus more durable.

Claims 15-18 are rejected under 35 U.S.C. 103(a) as being unpatentable over Blythe as modified by Byrne as applied to claim 1 above, and further in view of Kakimoto et al. or Mickey.

Art Unit: 3643

Referring to claim 15, Blythe as modified by Byrne does not disclose the second binder is isocyanate polyurethane. Kakimoto et al. and Mickey each disclose a layer of material comprising EPDM and a polyurethane isocyanate binder – see column 4 lines 15-65 of Kakimoto et al. and paragraphs [0016] thru [0018] of Mickey. Therefore it would have been obvious to one of ordinary skill in the art to take the device of Blythe as modified by Byrne and add the binder being isocyanate polyurethane of Kakimoto et al. or Mickey, so as to allow for the device to be strengthened and thus more durable.

Referring to claim 16, Blythe as modified by Byrne and Kakimoto et al. and Blythe as modified by Byrne and Mickey both do not disclose the ratio of binder to rubber is 20% by weight. However, this limitation is found through experimentation and it would have been obvious to one of ordinary skill in the art to take the device of Blythe as modified by Byrne and Kakimoto et al. and Blythe as modified by Byrne and Mickey and add the ratio of binder to rubber being 20% by weight, so as to allow for the device to be strengthened and thus more durable.

Referring to claim 17, Blythe as modified by Byrne and Kakimoto et al. and Blythe as modified by Byrne and Mickey further discloses the EPDM is granular – see Examples A and B in column 4 of Blythe.

Referring to claim 18, Blythe as modified by Byrne and Kakimoto et al. and Blythe as modified by Byrne and Mickey further discloses the granules are in the range of 1.5 to 6 mm in diameter – see Examples A and B in column 4 of Blythe.

Claims 19-20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Blythe as modified by Byrne as applied to claim 1 above, and further in view of U.S. Patent No.

Art Unit: 3643

4,205,102 to Schuurink et al.

Referring to claim 19, Blythe as modified by Byrne does not disclose the binder contains aliphatic diisocyanate. Schuurink et al. does disclose the binder contains aliphatic diisocyanate – see for example claim 3. Therefore, it would have been obvious to one of ordinary skill in the art to take the device of Blythe as modified by Byrne and add the binder containing aliphatic diisocyanate of Schuurink et al., so as to allow for the device to be strengthened and thus more durable.

Referring to claim 20, Blythe as modified by Byrne and Schuurink et al. further discloses the EPDM granules are in the range of 1.5 to 6 mm in diameter - see Examples A and B in column 4 of Blythe.

Claim 21 is rejected under 35 U.S.C. 103(a) as being unpatentable over Blythe as modified by Byrne as applied to claim 1 above.

Referring to claim 21, Blythe as modified by Byrne does not disclose the base layer 2 to 3 inches thick and the wear layer is 3/8 to 1/2 inch thick. However, these limitations are found through experimentation and it would have been obvious to one of ordinary skill in the art to take the device of Blythe as modified by Byrne and add the base layer being 2-3 inches thick and the wear layer being 3/8-1/2 inch thick, so as to allow for the device to be of sufficient size to be durable for outdoor use while not being too bulky for transport.

### ***Response to Arguments***

4. Regarding claims 1 and 3, the European patent EP 0135595 discloses a mixture of butadiene rubber granules and peelings or buffings as seen in the English abstract. Further, as

Art Unit: 3643

seen in the English translation the device of the European patent is described as web material which implies a woven and not completely solid structure which will allow for the device to be porous. The European patent does not specifically disclose the combination of butadiene rubber granules and peelings or buffings is varied in amount relative to one another to increase or decrease the porosity of the base layer. However, these are product by process limitations in an apparatus claim and therefore these limitations are considered but they offer no further structural limitations to the apparatus claims and it is deemed that the device of the European patent can be made using these product by process limitations so as to allow for the device to have the desired material properties.

Regarding claims 1, 3, 7 and 10-14, applicant argues that the Byrne reference US 5396731 is a tree skirt not made of materials that could be used as a sidewalk. However, as seen in columns 4-5 of Byrne rubber materials and binders are used in the tree skirt much like those of applicant's invention and as seen in applicant's specification the claimed materials of applicant's claimed invention can be used as a tree skirt or sidewalk. Further, Byrne discloses a porous base layer - see the abstract of Byrne and the combination of rubber granules and peelings or buffings is varied in amount relative to one another to increase or decrease the porosity of the base layer - see columns 4-5 of Byrne where the amount of rubber in the device can be varied to differing percentages of weight of the device.

Applicant's discussion of the Weinberg et al. reference US 3894686 and Crivelli reference US 5468539 has been considered.

***Conclusion***

5. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

6. Any inquiry concerning this communication or earlier communications from the examiner should be directed to DAVID J. PARSLEY whose telephone number is (571)272-6890. The examiner can normally be reached on Monday-Friday from 8am to 4pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Peter Poon can be reached on (571) 272-6891. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Art Unit: 3643

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/David J Parsley/  
Primary Examiner, Art Unit 3643